Supreme Court, U.S.
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No. 02-___

IN THE

Supreme Court of the United States

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, *et al.*,
Appellants,

v.

FEDERAL ELECTION COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the prohibition of certain broadcast communications by labor organizations and corporations in BCRA § 203(a) abridges the First Amendment insofar as it incorporates the "fallback" definition of the term "electioneering communications" set forth in BCRA § 201, with its last clause severed.

2. Whether the provisions prohibiting coordinated expenditures in BCRA §§ 202 and 214(a) are constitutional in light of the statute's mandate that no definition of "coordination" may require proof of "agreement or formal collaboration."

PARTIES TO THE PROCEEDINGS

This jurisdictional statement is filed on behalf of the American Federation of Labor and Congress of Industrial Organizations and its federally registered political committee, AFL-CIO Committee on Political Education Political Contributions Committee. Appellants were plaintiffs in *AFL-CIO v. Federal Election Commission,* Civ. No. 02-754 (D.D.C.), one of the eleven consolidated cases challenging the constitutionality of various provisions of the Bipartisan Campaign Reform Act of 2002. The appellees here, who were defendants or intervenor-defendants in the district court, are the Federal Election Commission; the Federal Communications Commission; the United States of America; Senator John McCain; Senator Russell Feingold; Representative Christopher Shays; Representative Martin Meehan; Senator Olympia Snowe; and Senator James Jeffords.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The district court's May 2, 2003 opinions and final judgment are not yet reported.

JURISDICTION

The district court entered judgment on May 2, 2003. Appellants filed their timely notice of appeal on May 7, 2003. App. 1a. The jurisdiction of this Court is invoked under section 403(a)(3) of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, § 403(a)(3), 116 Stat. 113-114.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

BCRA is reproduced in full in the appendices to the jurisdictional statements in *McConnell v. Federal Election Comm'n*, No.02-1674, *National Rifle Ass'n v. Federal Election Comm'n*, No. 02-1675, and *Federal Election Comm'n v. McConnell*, No.02-1676. Sections 201, 202, 203 and 214 of BCRA are reproduced at App.4a, *infra*.

STATEMENT OF THE CASE

1. The AFL-CIO's complaint in the district court presented First Amendment challenges to a number of provisions in Title II of BCRA: the outright prohibition on "any applicable electioneering communication" by labor organizations and corporations in § 203, which incorporates the primary and fallback definitions of "electioneering communication" in § 201; the requirement of advance disclosure of electioneering communications in § 201; the requirement of advance disclosure of independent expenditures in § 212; and various provisions addressing coordinated communications and expenditures in §§ 202 and 214. The complaint also challenged the requirement in § 504 directing broadcast licensees to maintain and make available for public inspection any request to purchase broadcast time for "communicat[ing] a message relating to any political matter of national importance . . . ."

The three-judge court, by a 2-1 vote, sustained the AFL-CIO's challenge to the primary definition of "electioneering communication." See Henderson op. 201-28; Leon op.

73-87. However, in an opinion by Judge Leon that was joined by Judge Kollar-Kotelly "solely as an alternative to this Court's finding that the primary definition is unconstitutional," Per Curiam op. 8, the court partially upheld the fallback definition of an electioneering communication after severing its final clause as unconstitutionally vague. Leon op. 88-95. The district court also unanimously struck down BCRA § 201's advance disclosure requirement for electioneering communications, Per Curiam op. 115-124; Henderson op. 228-42; unanimously struck down BCRA § 504's record-keeping requirement for broadcast licensees, Henderson op. 228-42; Kollar-Kotelly op. 614; Leon op. 111-15; and held non-justiciable the challenge to BCRA § 212's advance disclosure requirement for independent expenditures. Per Curiam op. 140-45. Finally, the district court rejected the AFL-CIO's challenge to two of BCRA's coordination provisions, § 202 and § 214(a), while finding that its challenges to §§ 214(b) and (c) were not justiciable at the present time. Per Curiam op. 138-69.

Under section 403(a)(3) of BCRA, the final decision of the district court in this case is "reviewable only by appeal directly to the Supreme Court of the United States." 116 Stat. 114. This Court is directed "to advance on the docket and to expedite to the greatest extent possible the disposition of the . . . appeal." *Id.* In addition to defending the appeals of the defendants and the intervenor-defendants from the district court's decision striking down BCRA § 203 insofar as it incorporates the primary definition of "electioneering communications" in section 201, its decision invalidating section 201's advance disclosure requirement for electioneering communication, and its decision invalidating section 504, the AFL-CIO submits this jurisdictional statement in order to appeal the district court's ruling upholding the fallback definition of "electioneering communication" as modified by

Judge Leon's opinion. The AFL-CIO also appeals the decision of the district court sustaining under the First Amendment the coordination provisions in BCRA §§ 202 and 214.

2. The AFL-CIO's claims in this litigation concerning BCRA's proscription of speech through broadcast media arise from its longstanding program, including through paid broadcast communications, to inform and engage union members and the general public concerning public policy issues affecting the lives of working families. In recent years, the AFL-CIO has spent millions of dollars on television and radio advertisements addressing issues such as the minimum wage, Medicare benefits, Social Security, health care, tax fairness, rights in the workplace, and trade policy, all in an effort to influence on-going policy and legislative debates on these issues and to hold federal officeholders accountable for their positions. The AFL-CIO's efforts reached an early zenith in 1995 and 1996 in response to the "Contract With America," the legislative agenda advanced by then-House Speaker Newt Gingrich and other House Republicans following the 1994 election that sought drastic cut-backs in virtually every federal program and regulatory scheme benefitting workers and their families. The AFL-CIO's broadcast advocacy program has continued throughout every non-election and election year since 1996 as these and other issues of vital importance to the labor movement and working families have persisted in the forefront of congressional and public debate.

In seeking to defend BCRA's limits on broadcast communications, defendants attempted to show that the statute's restrictions will not impede the AFL-CIO's advocacy program, but these arguments were rejected by both Judge Henderson and Judge Leon. Thus, Judge Henderson found that "BCRA's ban on corporate and labor disbursements for electioneering communications and the statute's disclosure and reporting requirements significantly interfere with the

AFL-CIO's missions" of providing "an effective political voice to workers on public issues that affect their lives and to fight for an agenda at all levels of government for working families." Henderson op. 116 (Finding of Fact 53). Judge Henderson also made detailed findings of fact regarding the AFL-CIO's television and radio advertisements from 1995 through 2001, Henderson op. 116-28, including, *inter alia*, that numerous ads run by the AFL-CIO would be banned under BCRA, Henderson op. 120 (Finding 53c), and that they would be "significantly less effective" if they did not mention legislative events or had to be aired outside of the weeks immediately preceding primary and general federal elections. Henderson op. 121 (Finding 53d).

In finding that BCRA's primary definition of electioneering communication is unconstitutionally overbroad, Judge Leon similarly cited as "a classic example of a legislation-centered genuine issue advertisement," Leon op. 78, an AFL-CIO ad from 1998 entitled "Barker," *id.*, and his findings of fact identify numerous other "genuine issue ads" run by the AFL-CIO that would have been prohibited under the primary definition. Leon op. 337-44. Most significantly with respect to this appeal, Judge Leon relied exclusively on AFL-CIO advertisements as examples of ads that, in some cases, would be protected under his revised fallback definition of electioneering communications and, in other cases, would be prohibited under that definition because they are not "neutral as to a federal candidate," Leon op. 92, 344-346, although Judge Leon failed to explain the basis for his conclusion that these ads are entitled to less protection under the First Amendment than are the ads he approved.

3. In *Buckley v. Valeo*, 424 U.S. 1, 47 (1976), this Court held that "prearranged or coordinated expenditures amounting to disguised contributions," are subject to federal prohibitions and limitations on contributions rather than the more lenient rules applicable to independent expenditures. Congress

responded to the Court's decision by amending the Federal Election Campaign Act ("FECA") to provide that "expenditures made by any person in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate." Pub. L. No. 94-283, § 112 (May 11, 1976), 90 Stat. 486, *codified as* 2 U.S.C. § 441a(a)(7)(B)(i) (2001).

Although the language of this provision was extremely broad, it still left room for the federal courts to narrow the definition of "coordination" on a case-by-case basis by requiring more than mere consultation or discussion with a candidate. *See, e.g., Clifton v. Federal Election Commission*, 114 F. 3d 1309, 1311 (1st Cir. 1997) (holding that coordination in the context of voter guides "implie[s] some measure of collaboration beyond a mere inquiry as to the position taken by a candidate on an issue"), *cert. denied*, 522 U.S. 1108 (1998); *Federal Election Commission v. Public Citizen, Inc.*, 64 F. Supp. 2d 1327 (N.D. Ga. 1999), (finding that contacts between a public interest group and a candidate in connection with an advertising campaign were not coordinated because of the absence of "collaboration") *rev'd on other grounds*, 268 F.3d 1283 (11th Cir. 2001); *Federal Election Comm'n v. Christian Coalition*, 52 F. Supp. 2d 45, 92 (D.D.C. 1999) (holding that substantial discussion with a candidate may be prohibited only where "the candidate and spender emerge as partners or joint venturers in the expressive expenditure. . . ."). And, taking its lead from these decisions, the Federal Election Commission issued regulations that defined coordination with some particularity to include, *inter alia*, "substantial discussion or negotiation . . . the result of which is collaboration or agreement." See 11 C.F.R. § 100.23(c)(2)(iii); 65 Fed. Reg. 76138, 76146 (December 6, 2000).

Dissatisfied with the measured approach to coordination taken by the courts and the FEC, Congress in BCRA

mandated a more expansive definition of "coordination" to be applied without regard to the facts in individual cases. Specifically, BCRA § 214(b) repeals the regulations issued by the FEC in December 2000. BCRA § 214(c), in turn, mandates that the Commission "promulgate new regulations on coordinated communications paid for by persons other than candidates, authorized committees of candidates, and party committees," and directs that these regulations "shall not require agreement or formal collaboration to establish coordination." Finally, BCRA § 214(a) amends section 315 of FECA to add a provision making clear that expenditures made in cooperation or consultation with a political party committee shall constitute a contribution in the same manner as expenditures that are coordinated with candidates constitute contributions to the candidates, and BCRA § 202 provides that expenditures for "electioneering communications" are contributions if they are coordinated with either a candidate or a political party. Although by its terms section 214(c) is a limitation only on the FEC's rulemaking power, Congress plainly intended also to bar the courts from interpreting sections 202 and 214(a) to require "agreement or formal collaboration" as a predicate to finding prohibited coordination under those provisions.

In their *per curiam* opinion Judges Kollar-Kotelly and Leon held that plaintiffs, including the AFL-CIO, lacked standing to challenge BCRA § 214(c) because they were not injured by the statutory direction to issue new regulations, even if those regulations are mandated not to require "agreement or formal collaboration," Per Curiam op. 156-58 ("Plaintiffs' allegation that they will be injured by regulations which by Congressional direction will be constitutionally overbroad, is not injury-in-fact"), and because plaintiffs' claims could not be redressed by striking section 214(c) in any event. Per Curiam op. 158-59. In the alternative, the majority ruled that plaintiffs' challenge to BCRA § 214(c) was not ripe for judicial review at this time because any

vagueness in the statutory definition of "coordination" might be cured by FEC regulations that were not before the court and that could only be considered in an action brought before a single district judge pursuant to the Administrative Procedure Act. Per Curiam op. 159-67.[1]

While the district court refused to reach plaintiffs' challenges to BCRA §§ 214(b) and (c), it did decide their challenge to BCRA § 214(a) on the merits, holding that BCRA's provision expanding the prohibition on coordinated expenditures to reach expenditures coordinated with a political party committee was neither unconstitutionally vague nor overbroad.[2] Per Curiam op. 146-54. With respect to vagueness, the court held that "[i]t is . . . possible that many, perhaps all, of Plaintiffs' vagueness concerns have been remedied by the [FEC] regulations' contents." Per Curiam op. 148. And, with respect to overbreadth, the court held that the statute's failure to require the existence of an "agreement" as a predicate to the finding of coordination was not required by the Constitution as interpreted in this Court's prior decisions. Per Curiam op. 149-54. Similarly, the

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[1] The majority also held that the challenge to BCRA § 214(b) was moot because the FEC issued regulations on January 3, 2003, thereby obviating any injury caused by the absence of agency regulations defining coordination after the December 2000 regulations were repealed. Per Curiam op. 154-55.

[2] The majority opinion is plainly wrong when it states that section 214(a) does not establish a ban on coordination. Per Curiam op. 146 n. 87. It is section 214(a) that causes expenditures that are coordinated with a party committee to be treated as contributions to that candidate, which in the case of corporations and labor organizations are flatly banned under 2 U.S.C. § 441b(a). Similarly, BCRA § 202 causes electioneering communications that are coordinated with candidates or parties to be treated as contributions. It is sections 202 and 214(b) that extend the ban on corporate and union contributions to reach coordinated communications and expenditures.

district court determined that BCRA § 202 was not unconstitutional insofar as it incorpc.ates the definition of "coordination" mandated in BCRA § 214. Per Curiam op. 138-40.[3]

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The questions presented by the AFL-CIO in this jurisdictional statement have already been raised in jurisdictional statements submitted by the plaintiff-appellants in *McConnell v. Federal Election Comm'n*, No. 02-1674, *National Rifle Ass'n v. Federal Election Comm'n*, No. 02-1675, *Republican Nat'l Comm. v. Federal Election Comm'n*, No. 02-___, and *Nat'l Right To Life Comm., Inc. v. Federal Election Comm'n*, No. 02-___, Additional plaintiffs are expected to file jurisdictional statements presenting similar issues as well. In addition to the number of parties seeking review, the multiplicity and complexity of the opinions below support plenary review in order to provide badly needed guidance regarding the conduct and financing of federal elections. Finally, for the following reasons, the issues presented for review in this jurisdictional statement raise substantial constitutional issues involving the right of citizens to participate freely in the political process.

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[3] The Per Curiam opinion's treatment of section 202 is unclear as to the basis for its decision. In its summary of the positions taken by the three judges, the opinion states that Judges Kollar-Kotelly and Leon "find this section constitutional." Per Curiam op. 8. Elsewhere, these judges similarly stated that "Plaintiffs' arguments are unavailing and the Court has been presented with no basis for finding Section 202 unconstitutional." Per Curiam op. 140. However, the majority also indicated that section 202 was not ripe for review "to the extent that the AFL-CIO challenges the scope of activities covered by BCRA's definition of coordination." *Id.* The majority did not further explain why some aspects of section 202 were ripe while others were not, and, in any event, the court's decision on ripeness was incorrect as set forth in the text.

I. THE "FALLBACK" DEFINITION OF "ELECTIONEERING COMMUNICATIONS" AS SEVERED AND UPHELD BY THE DISTRICT COURT VIOLATES THE FIRST AMENDMENT

The district court agreed with the AFL-CIO and other plaintiffs that the primary definition of "electioneering communications" in BCRA §201 is unconstitutionally overbroad, and that one of the two operative elements of the so-called "fallback" definition—that a union- or corporate-financed broadcast be "suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate"—is unconstitutionally vague. The governmental and congressional-intervenor appellants have asked this Court to reverse those judgments. The AFL-CIO believes those judgments were correct, but concurs that the questions presented concerning those provisions are substantial and that this Court should note probable jurisdiction over them.

The AFL-CIO's appeal addresses the correctness of the district court's judgment to sever and uphold the other operative element of the fallback definition, namely, that a union- or corporate-paid broadcast "promote[] or support[] a candidate for that office, or attack[] or oppose[] a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate). . . ." This element of the definition is itself unconstitutionally vague and overbroad and, as severed, actually enlarges the reach of the fallback definition in a manner that is plainly contrary to congressional intent.

The fallback definition (both in its original form and as broadened by the district court) applies to all broadcast communications without regard to temporal or geographic considerations, unlike the primary definition (whose overbreadth derives principally from the scope of the content of the communications that it covers). As judicially enlarged, the fallback definition, through the interplay of BCRA §§ 201

and 203, proscribes a union or a corporation from paying for any broadcast, any time and anywhere, that "promotes," "supports," "attacks" or "opposes" an individual who is a federal candidate; and, the definition explicitly eschews any limitation to "express advocacy." Thus Congress has enacted a prohibition, enforceable either civilly or criminally, that is directly at odds with the teachings of *Buckley v. Valeo*, 424 U.S. 1, (1976), *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), and a host of circuit courts of appeal decisions that identify express advocacy alone as the content standard that is narrowly tailored and serves a compelling governmental interest sufficient to justify prohibitory regulation of election-related speech in some circumstances.

It is our view that the express advocacy jurisprudence establishes a constitutional line that BCRA and the court below have eviscerated. The four-word formulation in the enlarged fallback that establishes a new zone of criminalized speech is undefined in the statute, and the FEC itself, which is defending this statute in its entirety in this Court, acknowledged in its pertinent rulemaking proceeding last fall that it could not be certain that *any* reference to a candidate would fall outside that formulation. See "Electioneering Communications," 67 Fed. Reg. 65190, 65200-02 (Oct. 23, 2002). Notably, none of the appellees as to this issue have suggested in their jurisdictional statements that this formulation satisfies the First Amendment.

Judge Leon's explanation of this standard included the observation that it pertains to any comment that is "not neutral" about a candidate, Leon op. 92, and his discussion and examples eschew any requirement that broadcast content even pertain to the candidate *qua* candidate in order to fall within the prohibition. While such a restriction would not save the formulation from a finding of substantial overbreadth, its absence underscores that it comprises a chilling and sweeping prohibition on both factual and opinion

commentary on the behavior of federal officeholders, virtually all of whom are candidates at all times.[4] Indeed, it is notable that on Friday, May 16, 2003, President Bush took actions that legally rendered him a "candidate" for reelection—for, from that moment until the district court's issuance on Monday, May 19, of its order staying its May 2 judgment below, it was a crime for the AFL-CIO, any other labor organization, any for-profit corporation and virtually any incorporated non-profit organization to broadcast anything about the President that was "not neutral," irrespective of its subject matter or its urgency to a policy or legislative goal of the organization.

That example resonates against a substantial record amassed in this litigation concerning the broadcast advocacy of the AFL-CIO and that of many other entities. While the imprecision of the enlarged fallback, notwithstanding Judge Leon's various examples, makes it hazardous to declare which AFL-CIO advertisements since 1995 would have been prohibited had that formulation been in effect, certainly a very considerable number of them would have been banned, including, of course, many that were broadcast a year or more before the next election. And, equally to the point, the AFL-CIO would have been chilled by the prohibition itself from undertaking much of its broadcast communications. A federal law that silences the ability of unions, corporations and non-profit groups from broadcasting views, and even simply objective facts, that stray from "neutral[ity]" about elected officials is wholly foreign to the First Amendment and fundamental principles of a democratic society.

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[4] Under FECA, a "candidate" is any individual who, among other actions, has received contributions or made expenditures in excess of $5,000.00. See 2 U.S.C. § 431(2)(A). Incumbent officeholders routinely raise and spend money from the very beginning of each election cycle in pursuit of reelection.

Although the AFL-CIO's appeal must focus on the portion of the fallback that the district court upheld, it is important to place it in the context Congress intended, that is, the full fallback that included the last clause, which can only be read to have been intended to narrow the definition as a whole. While the district court correctly held that this clause was unconstitutionally vague, its further significance is that it is, in fact, *not* severable from the clause that was upheld, so the infirmities in the final clause invalidate *all* of the fallback. There is neither legal authority nor constitutional warrant for a court to cure statutory vagueness by excising language with the result that the statute more broadly prohibits speech than did the original provision in full. Moreover, severability is a function of legislative intent. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 190 (1999); *Buckley v. Valeo*, 424 U.S. at 108. One cannot discern legislative intent from the statutory text that the first clause take effect alone. And, that analysis is fully confirmed by the congressional debate over the fallback. *See* 147 Cong. Rec. S3118-20, 3122-23 (daily ed., March 29, 2001); 127 Cong. Rec. S2704-13 (daily ed., March 22, 2001). Accordingly, if either the first operative element *or* the second and last operative element of the fallback definition is unconstitutional, then the other element must fall as well.

In sum, BCRA's novel and aggressive carving-out of a category of speech subject to civil and criminal sanction presents a question of substantial importance under the Constitution, with significant ramifications for the role and participation of thousands of organizations in civic life, and the accountability of federal elected officials and of individuals who aspire to their offices. This Court should note probable jurisdiction.

II. BCRA'S PROVISIONS PROHIBITING COORDINATED COMMUNICATIONS AND EXPENDITURES ARE UNCONSTITUTIONAL IN LIGHT OF THE STATUTE'S MANDATE THAT NO DEFINITION OF "COORDINATION" MAY REQUIRE PROOF OF AN "AGREEMENT OR FORMAL COLLABORATION"

In prohibiting any corporate or union expenditure that is made "in cooperation, consultation, or concert, with, or at the request or suggestion of, a national, State or local committee of a political party," BCRA § 214(a) imposes an overbroad, indeterminate and highly subjective set of conduct standards that can only chill protected speech and association. In particular, prohibiting or regulating political speech if it has been made in "consultation" with a candidate, without more, will, as noted by Judge Henderson, "inevitably deter contact between independent spenders and their elected representatives, a result 'patently offensive to the First Amendment.'" Henderson op. 253, *quoting Clifton v. Federal Election Comm'n*, 114 F.3d at 1314. As the district court recognized in ruling on the merits of section 214(a), see Per Curiam op. 154-167, the statutory definition of "coordination" set forth in this provision is subject to immediate challenge on both vagueness and overbreadth grounds, and plaintiffs have standing to raise that challenge because their conduct is presently being chilled by the statute's conduct standards.[5]

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[5] In urging this Court to dispose of the coordination issues summarily, intervenor-defendants focus almost entirely on BCRA §§ 214(b) and (c), rather than BCRA §§ 202 or 214(a). See Intervenor-Appellees' Response To Jurisdictional Statements in Nos. 02-1674 and 02-1675, 5-11. Referring to BCRA § 214(a) as a "minor" change, *id.* at 12, does nothing to limit the scope or effect of that provision on persons, such as the AFL-CIO, that are now subject to its broad prohibition. Similarly, as discussed in the text, the fact that section 214(a) draws on the pre-BCRA language prohibiting coordination with candidates is of no significance given the latitude afforded to agencies and courts to construe the candidate pro-

In rejecting plaintiffs' challenge to section 214(a) as unconstitutionally vague, the district court found that some of the statute's vagueness might be cured by regulations to be issued by the FEC pursuant to Congress' direction in section 214(c). Per Curiam op. 146, 148. The majority, however, ignored the undeniable fact that BCRA § 214(c) bars the agency from re-issuing a narrow definition of "coordination" that requires a showing of "agreement or formal collaboration" as a precondition to a violation of section 214(a). Thus, the major defect in section 214(a)'s prohibition on coordination with parties cannot be saved by agency regulations, as the majority concluded, because Congress explicitly prohibited the agency from providing such a cure.[6] In the words of Judge Henderson, who dissented from the majority opinion on this point, "sections 202 and 214 will violate the First Amendment no matter what the Commission does, for no regulation it promulgates may depart . . . from the provision's plain text." Henderson op. 254; see also *id.* at 255 (". . .the outcome of any further FEC rule-making will not affect the court's merits analysis.").

Similarly, the district court's reliance on the pre-BCRA definition of coordination as applied to candidates to suggest that the identical definition in section 214(a) is not vague or overbroad, see Per Curiam op. 148 ("Plaintiffs have provided

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vision narrowly to require a showing of "agreement or formal collaboration," an interpretation now barred by BCRA. The significance of BCRA §§ 214(b) and (c) to the present litigation is that they repeal the narrowing regulations previously issued by the FEC, and they bar the FEC and the courts from adopting any new construction of sections 202 or 214(a) that would require the elements of "agreement or formal collaboration."

[6] The district court's suggestion, Per Curiam 149, that any vagueness in the statutory language is also of no consequence because the statute can be "clarified" through the FEC's advisory opinion procedure ignores the fact that the agency itself is now prohibited from approving conduct because it does not involve agreement or formal collaboration.

no explanation as to why the application of this coordination formula to the context of political parties chills political speech any more than when applied to expenditures coordinated with political candidates."), fails to recognize that, prior to BCRA, neither the FEC nor the courts were barred from requiring agreement or collaboration as a precondition to finding prohibited coordination with candidates, and, as noted above, both the agency and the courts did exactly that. Without the saving element of "agreement or formal collaboration," now barred by BCRA § 214(c), the pre-BCRA prohibition on coordination with candidates is as vague and overbroad as BCRA § 214(a)'s prohibition on coordination with political parties, although a challenge to the candidate provision could not be brought before the three-judge court and therefore is not part of this case.[7]

Finally, the district court's legal conclusion that BCRA §§ 202 and 214(a) need not include "agreement or formal collaboration" as a required element of "coordination" in order to meet constitutional requirements is not supported by the decisions of this Court on which the court below relied. In *Buckley v. Valeo*, 424 U.S. at 47, for example, the Court extended the definition of contributions to include "prearranged or coordinated expenditures," in order to avoid "the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate." Third party expenditures present a danger of corruption, however, only if they are "potential alter egos for contributions . . . not functionally true expenditures." *Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431,

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[7] The fact that the plaintiffs did not challenge in this case the definition of coordination as applied to candidates is fully explained by the statutory provision limiting jurisdiction of the three-judge court to challenges to BCRA. See BCRA § 403. But it does not provide a basis for finding § 214(a) to be constitutional, as the district court suggested. See Per Curiam op. 148.

463 (2001). And, while this Court has recognized that "general . . . understanding[s]" and "wink or nod" arrangements may be regulated, *id.* at 442; *Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 518 U.S. 604, 614 (1996) (plurality opinion), as Judge Henderson correctly recognized, neither of these decisions approved a coordination standard that does not require some form of "agreement or formal collaboration." Henderson op. 253.

In contrast to BCRA's provisions limiting soft-money and electioneering communications, the statute's coordination provisions have received little public attention. The coordination rules mandated by BCRA are, however, at least as pernicious as the more widely recognized restrictions. Not only do sections 202 and 214(a) present the very real threat of limiting protected speech, they also infringe on the right of citizens to associate with candidates and political parties in carrying out that speech. Moreover, as demonstrated in the record of this case and as recognized by Judge Henderson, "the statutory definition of 'coordination' . . . is critically important . . . [b]ecause a bare *allegation* of coordination can subject any given spender to a series of costly and intrusive enforcement proceedings—whether the spender is in compliance with the law or not . . . ." Henderson op. 245 (emphasis in original).

This Court's prior decisions explaining the meaning of coordination have provided only partial guidance concerning the reach of prohibited "coordination." Prior to BCRA, the FEC and the lower federal courts had attempted to fill the gaps in this definition by carefully constructing a workable definition of prohibited coordination that, as instructed by this Court, was sensitive to both the danger of *quid pro quo* corruption and the need to protect political speech against unnecessary intrusion. BCRA throws out that definition, replaces it with a vague and overbroad statutory standard, and mandates that neither the Commission nor the courts develop

a narrower definition in the future. Whether this unfortunate action comports with the First Amendment presents more than a substantial question and should receive plenary review by this Court.

CONCLUSION

For the reasons set forth above, the Court should note probable jurisdiction.

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June 2, 2003

APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. No. 02-582 (CKK, KLH, RJL)
All consolidated cases.

SENATOR MITCH MCCONNELL, *et al.*,

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION, *et al.*,

Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is given that the following plaintiffs appeal to the Supreme Court of the United States from any and all adverse rulings incorporated in, antecedent to, or ancillary to the final judgment of the three-judge district court entered in this action on May 2, 2003: American Federation of Labor and Congress of Industrial Organizations and its federally registered political committee, AFL-CIO Committee on Political Education Political Contributions Committee.

This appeal is taken pursuant to section 403(a)(3) of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, 114.

Respectfully submitted,

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Dated: May 7, 2003

APPENDIX B

OPINIONS OF THE DISTRICT COURT

In accordance with the Court's May 15, 2003 order, an appendix containing the district court's opinions dated May 2, 2003, will be filed in coordination with other appellants.

APPENDIX C

PERTINENT PROVISIONS OF THE
BIPARTISAN CAMPAIGN REFORM ACT OF 2002,
PUB. L. NO. 107-155, 116 STAT. 81 (March 27, 2002)

SEC. 201. DISCLOSURE OF ELECTIONEERING COMMUNICATIONS.

(a) IN GENERAL.—Section 304 of the Federal Election Campaign Act of 1971 (2 U.S.C. 434), as amended by section 103, is amended by adding at the end the following new subsection:

"(f) DISCLOSURE OF ELECTIONEERING COMMUNICATIONS.—

"(1) STATEMENT REQUIRED.—Every person who makes a disbursement for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of $10,000 during any calendar year shall, within 24 hours of each disclosure date, file with the Commission a statement containing the information described in paragraph (2).

"(2) CONTENTS OF STATEMENT.—Each statement required to be filed under this subsection shall be made under penalty of perjury and shall contain the following information:

"(A) The identification of the person making the disbursement, of any person sharing or exercising direction or control over the activities of such person, and of the custodian of the books and accounts of the person making the disbursement.

"(B) The principal place of business of the person making the disbursement, if not an individual.

"(C) The amount of each disbursement of more than $200 during the period covered by the statement and the identification of the person to whom the disbursement was made.

"(D) The elections to which the electioneering communications pertain and the names (if known) of the candidates identified or to be identified.

"(E) If the disbursements were paid out of a segregated bank account which consists of funds contributed solely by individuals who are United States citizens or nationals or lawfully admitted for permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20))) directly to this account for electioneering communications, the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more to that account during the period beginning on the first day of the preceding calendar year and ending on the disclosure date. Nothing in this subparagraph is to be construed as a prohibition on the use of funds in such a segregated account for a purpose other than electioneering communications.

"(F) If the disbursements were paid out of funds not described in subparagraph (E), the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more to the person making the disbursement during the period beginning on the first day of the preceding calendar year and ending on the disclosure date.

"(3) ELECTIONEERING COMMUNICATION.—For purposes of this subsection—

"(A) IN GENERAL.—(i) The term 'electioneering communication' means any broadcast, cable, or satellite communication which—

"(I) refers to a clearly identified candidate for Federal office;

"(II) is made within—

"(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or

"(bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and

"(III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

"(ii) If clause (i) is held to be constitutionally insufficient by final judicial decision to support the regulation provided herein, then the term 'electioneering communication' means any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate. Nothing in this subparagraph shall be construed to affect the interpretation or application of section 100.22(b) of title 11, Code of Federal Regulations.

"(B) EXCEPTIONS.—The term 'electioneering communication' does not include—

"(i) a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate;

"(ii) a communication which constitutes an expenditure or an independent expenditure under this Act;

"(iii) a communication which constitutes a candidate debate or forum conducted pursuant to regulations adopted by the Commission, or which solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum; or

"(iv) any other communication exempted under such regulations as the Commission may promulgate (consistent with the requirements of this paragraph) to ensure the appropriate implementation of this paragraph, except that under any such regulation a communication may not be exempted if it meets the requirements of this paragraph and is described in section 301(20)(A)(iii).

"(C) TARGETING TO RELEVANT ELECTORATE.—For purposes of this paragraph, a communication which refers to a clearly identified candidate for Federal office is 'targeted to the relevant electorate' if the communication can be received by 50,000 or more persons—

"(i) in the district the candidate seeks to represent, in the case of a candidate for Representative in, or Delegate or Resident Commissioner to, the Congress; or

"(ii) in the State the candidate seeks to represent, in the case of a candidate for Senator.

"(4) DISCLOSURE DATE.—For purposes of this subsection, the term 'disclosure date' means—

"(A) the first date during any calendar year by which a person has made disbursements for the direct costs of producing or airing electioneering communications aggregating in excess of $10,000; and

"(B) any other date during such calendar year by which a person has made disbursements for the direct costs of producing or airing electioneering communications aggregating in excess of $10,000 since the most recent disclosure date for such calendar year.

"(5) CONTRACTS TO DISBURSE.—For purposes of this subsection, a person shall be treated as having made a disbursement if the person has executed a contract to make the disbursement.

"(6) COORDINATION WITH OTHER REQUIREMENTS.—Any requirement to report under this subsection shall be in addition to any other reporting requirement under this Act.

"(7) COORDINATION WITH INTERNAL REVENUE CODE.—Nothing in this subsection may be construed to establish, modify, or otherwise affect the definition of political activities or electioneering activities (including the definition of participating in, intervening in, or influencing or attempting to influence a political campaign on behalf of or in opposition to any candidate for public office) for purposes of the Internal Revenue Code of 1986."

(b) RESPONSIBILITIES OF FEDERAL COMMUNICATIONS COMMISSION.—The Federal Communications Commission shall compile and maintain any information the Federal Election Commission may require to carry out section 304(f) of the Federal Election Campaign Act of 1971 (as added by subsection (a)), and shall make such information available to the public on the Federal Communication Commission's website.

SEC. 202. COORDINATED COMMUNICATIONS AS CONTRIBUTIONS.

Section 315(a)(7) of the Federal Election Campaign Act of 1971 (2 U.S.C. 441a(a)(7)) is amended—

(1) by redesignating subparagraph (C) as subparagraph (D); and

(2) by inserting after subparagraph (B) the following:

"(C) if—

"(i) any person makes, or contracts to make, any disbursement for any electioneering communication (within the meaning of section 304(f)(3)); and

"(ii) such disbursement is coordinated with a candidate or an authorized committee of such candidate, a Federal, State, or local political party or committee thereof, or an agent or official of any such candidate, party, or committee;

such disbursement or contracting shall be treated as a contribution to the candidate supported by the electioneering communication or that candidate's party and as an expenditure by that candidate or that candidate's party; and".

SEC. 203. PROHIBITION OF CORPORATE AND LABOR DISBURSEMENTS FOR ELECTIONEERING COMMUNICATIONS.

(a) IN GENERAL.—Section 316(b)(2) of the Federal Election Campaign Act of 1971 (2 U.S.C. 441b(b)(2)) is amended by inserting "or for any applicable electioneering communication" before ", but shall not include".

(b) APPLICABLE ELECTIONEERING COMMUNICATION.—Section 316 of such Act is amended by adding at the end the following:

"(c) RULES RELATING TO ELECTIONEERING COMMUNICATIONS.—

"(1) APPLICABLE ELECTIONEERING COMMUNICATION.—For purposes of this section, the term 'applicable electioneering communication' means an electioneering communication (within the meaning of section 304(f)(3)) which is made by any entity described in subsection (a) of this section or by any other person using funds donated by an entity described in subsection (a) of this section.

"(2) EXCEPTION.—Notwithstanding paragraph (1), the term 'applicable electioneering communication' does not include a communication by a section 501(c)(4) organization or a political organization (as defined in section 527(e)(1) of the Internal Revenue Code of 1986) made under section 304(f)(2)(E) or (F) of this Act if the communication is paid for exclusively by funds provided directly by individuals who are United States citizens or nationals or lawfully admitted for permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20))). For purposes of the preceding sentence, the term 'provided directly by individuals' does not include funds the source of which is an entity described in subsection (a) of this section.

"(3) SPECIAL OPERATING RULES.—

"(A) DEFINITION UNDER PARAGRAPH (1).—An electioneering communication shall be treated as made by an entity described in subsection (a) if an entity described in subsection (a) directly or indirectly disburses any amount for any of the costs of the communication.

"(B) EXCEPTION UNDER PARAGRAPH (2).—A section 501(c)(4) organization that derives amounts from business activities or receives funds from any entity described in subsection (a) shall be considered to have paid for any communication out of such amounts unless such organization paid for the communication out of a segregated account to which only individuals can contribute, as described in section 304(f)(2)(E).

"(4) DEFINITIONS AND RULES.—For purposes of this subsection—

"(A) the term 'section 501(c)(4) organization' means—

"(i) an organization described in section 501(c)(4) of the Internal Revenue Code of 1986 and exempt from taxation under section 501(a) of such Code; or

"(ii) an organization which has submitted an application to the Internal Revenue Service for determination of its status as an organization described in clause (i); and

"(B) a person shall be treated as having made a disbursement if the person has executed a contract to make the disbursement.

"(5) COORDINATION WITH INTERNAL REVENUE CODE.—Nothing in this subsection shall be construed to authorize an organization exempt from taxation under section 501(a) of the Internal Revenue Code of 1986 to carry out any activity which is prohibited under such Code."

SEC. 214. COORDINATION WITH CANDIDATES OR POLITICAL PARTIES.

(a) IN GENERAL.—Section 315(a)(7)(B) of the Federal Election Campaign Act of 1971 (2 U.S.C. 441a(a)(7)(B)) is amended—

(1) by redesignating clause (ii) as clause (iii); and

(2) by inserting after clause (i) the following new clause:

"(ii) expenditures made by any person (other than a candidate or candidate's authorized committee) in cooperation, consultation, or concert with, or at the request or suggestion of, a national, State, or local committee of a political party, shall be considered to be contributions made to such party committee; and".

(b) REPEAL OF CURRENT REGULATIONS.—The regulations on coordinated communications paid for by persons other than candidates, authorized committees of candidates, and party committees adopted by the Federal Election Commission and published in the Federal Register at page 76138 of volume 65, Federal Register, on December 6, 2000, are repealed as of the date by which the Commission is required to promulgate new regulations under subsection (c) (as described in section 402(c)(1)).

(c) REGULATIONS BY THE FEDERAL ELECTION COMMISSION.—The Federal Election Commission shall promulgate new regulations on coordinated communications paid for by persons other than candidates, authorized

committees of candidates, and party committees. The regulations shall not require agreement or formal collaboration to establish coordination. In addition to any subject determined by the Commission, the regulations shall address—

(1) payments for the republication of campaign materials;

(2) payments for the use of a common vendor;

(3) payments for communications directed or made by persons who previously served as an employee of a candidate or a political party; and

(4) payments for communications made by a person after substantial discussion about the communication with a candidate or a political party.

(d) MEANING OF CONTRIBUTION OR EXPENDITURE FOR THE PURPOSES OF SECTION 316.—Section 316(b)(2) of the Federal Election Campaign Act of 1971 (2 U.S.C. 441b(b)(2)) is amended by striking "shall include" and inserting "includes a contribution or expenditure, as those terms are defined in section 301, and also includes".